

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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TRAVIS STEIN,	)	
Appellant,	)	
	)	
and	)	CASE NO. 102304
	)	
STATE OF IOWA	)	
(IOWA WORKFORCE DEVELOPMENT),	)	
Appellee.	)	

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**DECISION AND ORDER**

Appellant Travis Stein filed a State merit employee disciplinary action appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(2) and PERB rule 621–11.2(8A,20). Stein alleges there was not just cause to support the State of Iowa’s termination of his employment with Iowa Workforce Development (IWD), Occupational Safety and Health Administration (OSHA) on January 8, 2019. The State terminated Stein’s employment for his alleged misuse of State resources on three occasions in November 2018. The hearing was closed to the public pursuant to Iowa Code section 8A.415(2)(b) and PERB subrule 621–11.6(1).

Pursuant to notice, an evidentiary hearing on the merit appeal was held before the Board on September 25 and 26, 2019. Both parties were represented by counsel: Mark Sherinian for Stein and Annie Galbraith and Alla Minzter Zuprudsky for the State. The parties filed post-hearing briefs, the last of which was filed on November 18, 2019.

Based upon the entirety of the record, and having reviewed and considered the parties' briefs, we conclude the State failed to establish just cause existed to support its termination of Stein's employment, but just cause existed to support the imposition of a written reprimand.

**I. FINDINGS OF FACT.**

**A. Background.**

The State employed Stein as a Workforce Advisor in February 2017. Stein has his master's degree in business. In his May 2018, evaluation, he met expectations and it was noted that Stein performed his duties accurately and in accordance with laws, rules, procedures, and standards. It was commented Stein continuously reviews his own work; immediately corrects his work and seeks advice when errors are made; and reports to work consistently and on time.

Stein went to OSHA sometime in May or June 2018, as a compliance safety and health officer (compliance officer or inspector or CSHO). The Iowa OSHA enforces safety and health standards to prevent injuries and illnesses in the workplace. OSHA is led by a commissioner and deputy commissioner followed by an administrator, two supervisors, and support staff. Additionally, there are approximately 22 compliance officers and 12 consultants.

The OSHA compliance officers investigate complaints, accidents, and fatalities. They also conduct workplace inspections. Their initial training consists of a two-week "1000 compliance" course at the OSHA Training

Institute in Chicago then as soon after that, a “1050 safety standards” course. Mixed in are on-the-job training with job shadowing of a senior compliance officer and numerous other courses at the OSHA Training Institute, *e.g.*, interviewing, inspection techniques. It is standard practice that the compliance officers complete the two initial courses before completing independent investigations. Stein completed the initial “1000 compliance” course in July 2018, but did not complete the “1050 safety standards” course until December 2018. The compliance officers travel frequently and use State vehicles.

In fall 2018, Stein was interviewed as part of an investigation of an OSHA supervisor, Deb Babb, who was political friends with the OSHA Commissioner Michael Mauro and Deputy Commissioner Pam Conner. Stein feared retaliation for his interview because he had recalled situations where supervisor Babb had gotten angry. Stein described OSHA as a hostile work environment. In October, Babb left OSHA. The OSHA administrator Jens Nissen left as well. As a result, the other supervisor, Don Peddy, became the interim administrator and compliance officer Gary Beer became a lead worker.

In the month that followed, the State alleged Stein misused resources on three occasions: November 5, 9, and 16. The first occasion involved Stein’s failure to leave his work in Ottumwa and attend a meeting in Des Moines, which prompted the State’s investigation. Regarding the other two, the State alleges Stein and co-worker Jason Garmoe left a State vehicle idling

for over two hours on November 9 and Stein drove a State vehicle, along with co-worker Kyle Sisler, to his residence without permission or business reason on November 16. The State's transcripts of interviews conducted of Stein and three others, lead Compliance Officer Gary Beer and Compliance Officers Kyle Sisler and Jason Garmoe, were admitted at hearing and are a part of the record we reviewed. At hearing, Beer, Interim Administrator Don Peddy, and investigator Andrea Macy testified for the State and Stein, former OSHA Administrator Jens Nissen, and Compliance Officer Kyle Sisler testified for Stein.

There are a number of undisputed facts of record, including the location and routes of Stein's State vehicle usage on the three occasions. However, the characterization of Stein's actions on those dates vary. We have attempted to reconcile perceived conflicts in the evidence, which consists primarily of the interviews conducted in the course of management's investigation, testimony elicited at the hearing, and the State's GPS records and Google maps concerning Stein's State vehicle usage and location. Where the evidence is not reasonably reconcilable, we have credited that which is most reasonable and consistent with other credible evidence, giving consideration to established criteria for the making of credibility determinations such as the witnesses' actual knowledge of the facts, memory, interest in the outcome of the case and candor.

## **B. November 5 trip to Ottumwa.**

When Beer became the team lead for compliance officers, he assigned Stein to do investigations although Stein had not completed all of the standard training, *i.e.*, 1050 standards course. For OSHA investigations, the preferred method of interview is face-to-face.<sup>1</sup> Beer reminded Stein of this after Stein conducted a telephone interview in one of his first investigations.

In October, Stein was assigned to investigate a complaint from an injured employee employed by a construction company in Ottumwa. The complainant was working with a coalition to get the employees organized and represented by a union. There was no one at the business when Stein made his first trip to Ottumwa on October 30. When the employer returned Stein's subsequent phone call, they had a preliminary conference and made plans to meet in Ottumwa on November 5. Stein was unable to reach the complainant at the telephone number of record. On November 2, Stein discussed his planned trip to Ottumwa with Beer.

On November 5, Stein drove a State vehicle to Ottumwa and met with the construction company employer. Although OSHA does not release the complainant's name, the employer figured it out and handed Stein the business card of the attorney who was representing the coalition. The meeting ended after 11:00 a.m. Stein started the vehicle and called Beer at

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<sup>1</sup> This critical fact is disputed by lead worker Beer, but is supported by the testimony of Administrator Peddy, former Administrator Nissen, and Stein.

11:10 a.m. for advice because it was Stein's second trip there and he did not know whether he should contact the coalition attorney. Beer reminded Stein of a mandatory meeting at 1:30 p.m. that had been scheduled by Interim Administrator Peddy via an earlier email. Stein inquired what Beer wanted him to do and said, "If you want me to come back here, I'll come back, but otherwise, you just tell me what you want me to do because I don't know." Beer reminded Stein that interviews needed to be done in person and said, "Do the best you can." Stein asked again for direction and Beer told him that interviews needed to be done in person and he (Beer) would talk to Don Peddy. Beer never said, "You have to get back to Des Moines."

Following his conversation with Beer, Stein headed to the river where he believed the complainant and coalition were located and supposed to be picketing. After Stein did not see anyone picketing, he called the coalition's attorney and left a message with the receptionist at 11:35 a.m. The attorney returned his call at 11:44 a.m., indicated he was indirectly representing the complainant, and directed Stein to call back the number and speak to his secretary to get the complainant's contact information. Stein hung up and called the secretary at 11:46 a.m. The secretary said she would get back to Stein after lunch.

There was ongoing construction along the entire length of a bridge and Stein parked in a nearby diner lot. For fifteen to twenty minutes, Stein observed the construction with binoculars to see if there were any hazards. He ate lunch in the diner for about an hour. After Stein returned to his

vehicle, he observed another construction site of a renovation across the way. He never heard back from the attorney's secretary. Stein left Ottumwa and made several stops on the way back to the State garage. He stopped at a convenience store in Pleasant Hill around 3:00 p.m. to use the restroom. Stein realized afterwards that he needed fuel and stopped at another convenience store, but saw that it did not have E-85 fuel. He continued on to the State's gas pumps in the East Village, but they were coned off so he ended up getting gas downtown at 3:58 p.m. and returned the vehicle in the ramp afterward.

**C. November 9 inspections and use of State vehicle.**

On November 9, Stein conducted inspections of two adjacent construction jobsites located south of East Village. Compliance Officer Jason Garmoe accompanied Stein who was responsible for the State vehicle they utilized that day. Stein recalls leaving the vehicle parked, shut off, and the doors locked during the time of their inspections. The State vehicle report for that day reflects the vehicle idled for over two hours. Garmoe did not testify, but according to Stein, Garmoe asked for the car keys to retrieve a personal item and, at a much later time at the unemployment hearing, Garmoe recalled the vehicle was not idling.

**D. November 16 trip home during workday.**

On November 15, after 4:30 p.m., Stein received a telephone call back from an employee who had broken his back at work. Stein was at home at the time and took notes of his preliminary interview with the employee. The

next day, Compliance Officer Kyle Sisler accompanied Stein to interview the employee at Mercy Hospital. After they left the State parking garage, but before the interview, Stein drove to his residence seven minutes away to retrieve his folder and notes that he had left on his table along with his State identification.<sup>2</sup> While there for about 25 minutes, Stein invited Sisler to view his poker room in the basement and Stein used the bathroom. Stein was not aware that he needed permission to drive a State vehicle to his residence if it was work-related.

#### **E. Investigation.**

After Stein missed the November 5 meeting, Interim Administrator Peddy or the OSHA Deputy Commissioner Conner contacted IWD Human Resources Manager Andrea Macy to investigate the matter. To the knowledge of several, OSHA had never before investigated or disciplined an employee for missing a meeting. Nissen, the previous OSHA administrator for approximately four years, testified “I don’t recall that we ever had a meeting where everyone was in attendance.” On December 10, there was a mandatory meeting for 20-30 OSHA safety and health employees to team up for ride-assignments for training in Illinois. Two employees arrived late and missed the meeting. They were not investigated or disciplined. OSHA’s

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<sup>2</sup> When Sisler was later interviewed about this trip, he recalled that they were there for Stein to retrieve something, but Sisler did not recall what Stein was retrieving from his residence.

practice on meetings and treatment of other employees who missed meetings were not a part of the investigation.

Interim Administrator Peddy assisted Macy in her investigation. As the first step, Macy requested a statement from Beer. Beer's brief statement, signed November 13, 2018, provides,

11:10 am I received a phone call from Travis Stein on my personal cell phone. Travis had some questions regarding the complaint inspection he was working on in Ottumwa. I discussed the complaint issues with him and then also reminded him that there was a mandatory meeting that same afternoon at 1:30, that he would have received an email regarding the meeting. Travis commented that he didn't remember seeing the email that he would try to get there but didn't know if he would be able to get back in time. The phone call was @ 11:10 am and was 8 minutes in length.

Beer never mentioned in his statement that he told Stein to do his best to get back for the meeting.

As a result of Beer's initial statement on November 13, Macy requested GPS records of Stein's State vehicle usage for November 5. The document reflects the times that the vehicle was turned on and off and was moving. Macy also downloaded Google maps and plotted Stein's November 5 route. On December 14, Macy and Peddy interviewed Stein about his route that day.<sup>3</sup> Stein was only questioned about his November 5 workday. Although the record is not specific about the date, it appears that following Stein's

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<sup>3</sup> Macy seemingly drew adverse inferences when, in the course of the interview, Stein failed to recall specifics of his November 5 workday. We do not give Stein's lack of recall the same weight as Macy under all the evidence presented, including, but not limited to, the fact that the interview occurred over a month after November 5 and was unexpected for Stein.

interview, Macy obtained GPS records for all of Stein's November State vehicle usage. Based on this information, Stein had left a State vehicle idling for two hours on November 9 and had driven a State vehicle to his personal residence on November 16. Macy downloaded a Google map and plotted his route on November 9.

On December 18, Stein voluntarily provided a redacted copy of his personal cell phone record for November 5. Between December 18 to December 21, Macy and Peddy interviewed Kyle Sisler, Jason Garmoe, Beer on two occasions; and Stein for a second time. In Stein's second interview, he was questioned about all three occasions for the first time.<sup>4</sup>

When Beer was interviewed, he did not recall or he denied relevant parts of his November 5 conversation with Stein, including, but not limited to their conversation about the complainant's attorney and why Stein should have remained in Ottumwa. Although the whole purpose of Stein's call was to get direction on his investigation, Beer stated in his interview with Macy and Peddy:

Q: Did he say why he thought he needed to stay in Ottumwa or?

A: Not specifically. He just said he didn't think he'd be able to get back in time.

Beer denied any recollection about Stein talking about getting a phone number for the complainant's attorney. Beer denied or did not recall Stein asking him for direction. Beer did state, "I think I told him that he needs to

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<sup>4</sup> We do not draw the same adverse inferences as Macy from Stein's failure to recall the specifics of his November 9 and 16 work days.

get back if he can.” Macy put great weight on Beer’s interview and his statements. She testified “they’re not required to interview people in person” and Beer had told Stein that he “really needed to get back for [the meeting].”<sup>5</sup> However, Beer testified at hearing that he told Stein to “do his best to get back to the meeting.”

At the conclusion of the investigation, Macy and Peddy determined Stein engaged in misconduct on the three occasions. They discussed their findings with the commissioner and deputy commissioner. According to Macy, there were no examples of similarly situated employees to consider. They did not believe lesser forms of discipline were appropriate because of what Macy described as Stein’s short-term tenure and the trust required of compliance officers who work independently. Although Stein did not have any prior discipline, they determined termination was warranted.

Accordingly, by letter dated January 8, 2019, Peddy notified Stein that the State was terminating Stein’s employment immediately:

An administrative investigation revealed that, on the morning of November 5, 2018, you drove a State vehicle to Ottumwa, Iowa, to perform an OSHA inspection. Despite receiving a notice from your manager on October 30, 2018, that you were to attend a mandatory staff meeting at 1:30pm on November 5, and a reminder about the mandatory staff meeting from your lead worker at approximately 11:10am on November 5, you failed to return to Des Moines and attend the mandatory staff meeting. Rather, the investigation revealed that you remained in Ottumwa until approximately 1:41pm, without completing any further substantive work.

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<sup>5</sup> These assertions, while perhaps reasonable inferences from Beer’s statements, are not supported by the record.

Additionally, the investigation revealed that, on November 16, 2018, you used a State vehicle to drive yourself and a new employee to your personal residence, which was not on the way to your work destination, where you stopped for approximately 26 minutes without permission or a business reason to do so. This egregious misuse of State time and resources, alone, is sufficient cause for the termination of your employment.

The investigation further revealed that, on November 9, 2018, you and a coworker left a State vehicle idling for over two hours and unattended for at least a part of that time.

The investigation determined that you violated the following IWD Work Rules:

### **General Standards of Conduct**

2. An employee is prohibited from engaging in unprofessional and/or inappropriate conduct.

6. An employee must follow the instructions of their supervisor or other designated members of management at all times, unless those instructions would cause a violation of these Work Rules or other state or department policies, or pose a potential health or safety concern, in which case the employee should bring that to the attention of the next level supervisor.

7. An employee must perform the employee's work efficiently.

### **Standards of Conduct While on State Time**

2. While on State time, an employee is prohibited from:

a. Conducting personal business, including, but not limited to, personal visits, errands, appointments, meetings, trips, projects, activities, insurance claims, raffles, auctions, shopping, phone calls, emails, text messages, instant messages, computer use, internet use, mobile phone app use, social media use, streaming internet video, or other personal activities;

g. Loitering or spending time away from the employee's assigned work station to engage in conversation or activities unrelated to work;

j. Otherwise neglecting job duties.

### **Work Performance**

2. Poor work is not acceptable. Employees are expected to perform their work properly and efficiently and to meet performance standards. Employees are expected to seek, accept, and accurately complete assignments within deadlines and not neglect job duties and responsibilities.

## **Use of State Property**

### **General Standards**

3. An employee is prohibited from using State property for personal business, including, but not limited to, personal visits, errands, appointments, meetings, trips, projects, activities, insurance claims, raffles, auctions, shopping, phone calls, emails, text messages, instant messages, computer use, internet use, mobile phone app use, social media use, streaming internet video, gambling, or other personal activities.

### **Access to State Property**

6. An employee must use prudent judgment and care in the use of State property.

### **Vehicles**

1. All employees who use a State vehicle must follow DAS Administrative Rule 11—103 State Employee Driving Guidelines and the DAS Fleet Services Policies and Procedures Manual.

3. An employee must complete the employee's authorized travel in a State vehicle in the most efficient manner possible.

4. An employee is prohibited from using a State vehicle for unauthorized, improper, malicious, illegal, or unethical purposes.

6. An employee is prohibited from using a State vehicle for personal use.

### **DAS Fleet Services Policies and Procedures Manual Authorized and Unauthorized Use of State Vehicles**

Per Code of Iowa section 8A.363, state officers or employees shall not use a state-owned motor vehicle for personal private use. However, a vehicle may be driven to an assigned driver's home if the driver's home is the approved work location. Upon prior written request, the DAS Fleet Services manager may authorize a state vehicle to be driven home if the driver lives in the same direction as a scheduled trip destination ...

### **Idle Time Policy**

. . . The intent of this Policy is to reduce vehicle exhaust emission and air pollution, promote fuel conservation and reduce fuel costs, assist in reduction of vehicle maintenance, increase operation efficiency and promote safety.

**Idling Guidelines:** The guidelines on DAS Motor Pool vehicle idling are as follows:

B. Limit vehicle idle time to no more than five minutes during initial warm-up and when restarting a vehicle after a shutdown of four hours or more.

- C. Do not unnecessarily idle a vehicle more than five minutes when it is stopped for a foreseeable period of time.
- H. Under no circumstances shall an idling be left unattended. The engine must be shut off, keys removed and vehicle locked.

Stein appealed his termination to the director of the Department of Administrative Services (DAS). On January 28, 2019, the DAS's director designee issued an answer that denied Stein's appeal, concluding just cause for the termination existed due to Stein's violations of the work rules. Stein timely filed his appeal with PERB on February 21, 2019.

## **II. CONCLUSIONS OF LAW.**

### **A. Just cause standard.**

Stein's DAS and PERB appeals were filed pursuant to Iowa Code section 8A.415(2), which provides:

#### 2. Discipline resolution.

*a.* A merit system employee ... who is discharged, suspended, demoted or otherwise receives a reduction in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the [DAS] director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.

*b.* If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

The relevant DAS rule provides:

**11-60.2(8A) Disciplinary actions.** Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge. Disciplinary action involving employees covered by collective bargaining agreements shall be in accordance with the provisions of the agreement. Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

In the absence of a definition of "just cause," PERB has long considered the totality of circumstances and rejected a mechanical, inflexible application of fixed elements in its determination of whether just cause exists. *Wiarda & State (Dep't of Human Servs.)* 01-MA-03 at 13-14 appendix. In analyzing the totality of circumstances, examples of factors which may be relevant to a just cause determination include, but are not limited to:

whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether there is sufficient proof of the employee's guilt of the offense; whether progressive discipline was followed, or is not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance,

and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

*Gleiser & State of Iowa (Dep't of Transp.)*, 09-MA-01 at 16-17.

PERB also considers the treatment afforded other, similarly situated employees relevant to a just cause determination. *Woods & State of Iowa (Dep't of Inspects. and Appeals)*, 03-MA-01 at 4. All employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for a difference in the punishment. *Id.* The presence or absence of just cause must rest on the reasons stated in the disciplinary letter. *See Eaves & State of Iowa (Dep't of Corrections)*, 03-MA-04 at 14. The State bears the burden of establishing that just cause supports the discipline imposed. *Harrison & State (Dep't of Human Servs.)*, 05-MA-04 at 9.

**B. Analysis of the three occasions.**

In its brief, the State identified the specific IWD work rules allegedly violated for each occasion. Overall, the rules can be summarized as 1) comply with supervision's orders; 2) perform work properly and efficiently; 3) do not conduct personal business while on State time; and 4) use State vehicles in accordance with set guidelines. It is undisputed that Stein had knowledge of these rules, which management alleges Stein violated. However, in two of the occasions, Stein did not have knowledge and notice of what constitutes acceptable and expected conduct pursuant to the rules. For one, Stein did not have notice of how to proceed with his November 5

investigation and perform his work properly and efficiently under the circumstances. This is the entire reason why he called lead worker Beer for direction. Stein did not know, but did the best he knew how. Second, Stein was not aware that he needed permission to drive to his residence on November 16 to retrieve work items. Notice of the acceptable and expected conduct was lacking on both occasions.

The State's assertion that it conducted a sufficient and fair investigation is not supported by the record. There appears an express bias in management's decision to investigate Stein for merely missing a meeting when other employees were not similarly investigated for this same offense. Nissen testified that he could not remember a meeting where everyone attended in his four years as administrator. Two people missed a mandatory meeting in December. Yet, no other OSHA employee had been investigated or disciplined for missing a meeting. The investigation was not initiated in a fair manner and it was lacking by failing to address the history and treatment of employees' attendance at OSHA meetings.

There was an unexplained delay in Macy's interview of Stein. Beer's written statement about his phone call with Stein was signed on November 13 and presumably submitted that day or within a short duration thereafter. The State paints Stein's November 5 actions as egregious, but did not interview Stein until December 14, a month after receipt of Beer's statement. The investigator then faulted Stein for failing to recollect his workday a month earlier.

Additionally, the investigation was not sufficient and fair due to Macy's reliance on Beer's statements and incorrect inferences she drew as a result. The investigation was flawed from the beginning and at the end based in part on Beer's cagey description of his conversation with Stein on November 5. In his written statement on November 5 and in his December interview, Beer was not forthcoming about critical information. During his interview, Beer denied relevant parts of his conversation with Stein.

Beer left the incorrect and fatal impression that Stein was vague about his investigation and work in Ottumwa and whether he would make the meeting. In Beer's written statement on November 5, 2018, he failed to mention that he told Stein to "do his best to get back to the meeting." Macy incorrectly believed and testified that Beer told Stein to get back for the meeting and therefore Stein was insubordinate when he was absent. Beer misled investigator Macy regarding information relevant to Stein's purpose for staying in Ottumwa. Beer denied any recollection about Stein talking about having the phone number for the complainant's attorney and Beer denied that Stein was specific about why Stein needed to stay in Ottumwa. Beer stated face-to-face interviews were not a preferred and necessary manner of interview although both former and current OSHA administrators testified otherwise.

The State's investigation failed to reveal critical facts and drew incorrect inferences about Stein's November 5 work day and failure to make a meeting. It was started for what appeared to be an employee's benign

failure to attend a meeting. The State failed to establish it conducted a sufficient and fair investigation.

There is not sufficient proof that Stein engaged in all of the conduct alleged to be in violation of the IWD work rules. Stein's November 5, 9, and 16 route and stops, and his failure to attend a November 5 mandatory meeting are undisputed facts. Based on the State's vehicle records, there is sufficient proof that Stein left his vehicle idling on November 9. We are more persuaded by the vehicle record than the hearsay testimony that the car was parked and shut off according to Garmoe. Thus, there is sufficient proof that Stein left a State vehicle idling for an excessive period in violation of IWD work rules, "Vehicles," paragraphs (1) and (3). We do not agree that the idling of the vehicle constitutes "unauthorized, improper, malicious, illegal, or unethical purposes," as set out in paragraph (4). Nor does the idling constitute a violation of paragraph (6) as the use of a State vehicle for personal use.

However, the characterization of Stein's actions on November 5 and on November 16 and the conclusions reached are unsupported by the evidence of record. First, there is insufficient proof that Stein drove to his residence on November 16 for personal reasons. His explanation for having to retrieve his work notebook and identification is reasonable under the timeline and context presented. When interviewed, Sisler recalled they made the trip for Stein to retrieve something. The evidence supports finding Stein drove to his residence for a business purpose and therefore there is not

sufficient proof that he violated IWD work rules, “General Standards,” paragraphs (3) and (6) and DAS Fleet policies on using State vehicles for private use.<sup>6</sup> Although the State alleges Stein’s time at his residence was excessive, the State had not alleged that Stein violated an IWD work rule for being inefficient in his trip to his residence for what we determined to be a business purpose.

There is also insufficient proof that, on November 5, Stein’s actions in Ottumwa were a waste of State resources and Stein was insubordinate for missing a meeting. Based on Stein’s volunteered phone records and Stein’s explanation, we are more persuaded that Stein called Beer for the specific purpose of getting direction on the inspection Stein was conducting. Also critical to Stein’s course of action was to stay in Ottumwa for the benefit of having a face-to-face interview if possible. We are not persuaded that the two did not have a substantive discussion on Stein’s course of action and the possibility that Stein would miss the meeting—especially given Beer’s comment for Stein to do his best. Given Stein’s phone record of his calls with the attorney’s office, it follows that he stuck around Ottumwa waiting for the complainant’s contact information and he made use of his time in the interim given the location and circumstances. We also view Stein’s explanation for the stops on the way back as credible. Thus, the State failed to provide sufficient proof Stein wasted State resources and was insubordinate on November 5.

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<sup>6</sup> These are the IWD work rules cited in the State’s brief for this particular occasion.

### **C. Analysis of totality of circumstances.**

In summary, the State established sufficient proof that Stein violated IWD work rules when, on November 9, he left a State vehicle idling for over two hours. Based on the record, there is insufficient proof that Stein violated IWD work rules on November 5 when he stayed in Ottumwa to work on an inspection and he missed a meeting; and there is insufficient proof that Stein used a State vehicle and made a trip to his residence for personal reasons on November 16, 2018.

Having concluded that these violations of IWD work rules occurred only on November 9 for the excessive idling of a State vehicle does not, however, end the inquiry. Consistent with the just cause standard, there are other factors to examine. Another factor for consideration includes Stein's favorable evaluation and work as an advisor before he became a compliance officer. Additionally, Stein did not have any prior disciplinary action during his tenure.

Finally, as Stein's evaluation reflects, he is an employee who corrects mistakes. The State should have applied progressive discipline in this case. PERB has long recognized that the purpose of employee discipline is to correct an employee's behavior, rather than merely to punish. *Barnard & State of Iowa (Dep't of Human Servs.)*, 17 ALJ 100758 at 20.<sup>7</sup>

Progressive discipline is a system of addressing employee behavior over time, through escalating penalties. The purpose of progressive discipline is to correct the unacceptable behavior

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<sup>7</sup> PERB case citations have changed since PERB's implementation of an electronic document management system.

of an employee. Employers impose some penalty less than discharge to convey the seriousness of the behavior and to afford employees an opportunity to improve.

Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998). The State's policy is one of progressive discipline "whereby measures of increasing severity are applied to repeat offenses until the behavior is corrected or it becomes clear that it cannot be corrected." *Phillips & State of Iowa (Dep't of Corrections)*, 98-MA-09 at 14. Stein's offense is not serious enough to justify skipping some of the progressive steps ordinarily imposed in the application of progressive discipline. *See, e.g., Hoffman & State of Iowa (Dep't of Transp.)*, 93-MA-21 at 26.

After consideration of the IWD work rules violated by Stein, the insufficiency of the investigation, his employment record, mitigating circumstances, the appropriateness of progressive discipline, and other relevant factors, we conclude the State failed to establish just cause existed to support its termination of Stein's employment. Under the totality of the circumstances revealed by the record here, a modification of the disciplinary action is warranted from a termination to a written reprimand.

Accordingly we order the following:

#### ORDER

The Iowa Workforce Development shall reinstate Travis Stein to his former position (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore his benefit accounts to reflect accumulations he would have

received but for the discharge; make appropriate adjustments to his personnel records and take all other actions necessary to restore him to the position he would have been in had he not been terminated on January 8, 2019, and instead received a written reprimand.

The cost of reporting and of the agency-requested transcript in the amount of \$2,009.50 are assessed against the State of Iowa, Iowa Workforce Development, OSHA, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State of Iowa in accordance with PERB subrule 11.9(3).

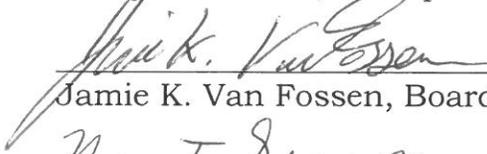
This decision constitutes final agency action only on the issue of whether the State established just cause for Stein's termination. The Board retains jurisdiction of this matter in order to address any remedy-related matters, which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, in the event the parties fail to reach agreement and in the absence of a party filing a petition for judicial review, the Board will schedule a hearing within 45 days of the below date to receive evidence and arguments on the precise terms of the remedy. Agency action on the appropriate remedy will not be final until its specifics are approved or determined by the Board. The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may hereafter arise.

DATED at Des Moines, Iowa, this 19th day of March, 2020.

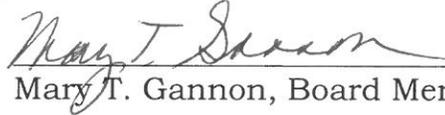
PUBLIC EMPLOYMENT RELATIONS BOARD



Cheryl K. Arnold, Chairperson



Jamie K. Van Fossen, Board Member



Mary T. Gannon, Board Member

Original filed EDMS.